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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ESSIEN NGUVU FRANK, Defendant and Appellant.	B234474 (Los Angeles County Super. Ct. No. BA362808)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Shawn McGahety Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Essien Nguvu Frank was convicted[1] by jury of making a criminal threat in violation of Penal Code section 422.[2] Defendant admitted serving three prior prison terms as defined in section 667.5, subdivision (b). The trial court sentenced defendant to the midterm of two years in state prison on the section 422 violation, enhanced by one year for a prior prison term.

Defendant initially raised only one issue in this appeal. He requested this court to conduct an independent review of the in camera hearing in regard to his motion for discovery of relevant personnel records of Ashley Wilbourne-Hamer, the victim of the section 422 violation. In a supplemental brief, defendant argues the trial court committed reversible error by failing to sua sponte instruct that oral statements of a defendant must be viewed with caution, as set forth in Judicial Council of California Criminal Jury Instructions (2010-2011) CALCRIM No. 358. We hold the trial court did not abuse its discretion in denying discovery and failure to give the cautionary instruction was not prejudicial error. The judgment is affirmed.[3]

FACTS

The facts are not in dispute for purposes of appeal and may be briefly summarized in the light most favorable to the judgment. Defendant was cited for a parking violation by Wilbourne-Hamer, a traffic officer employed by the City of Los Angeles. Defendant drove toward the officer, who stepped aside to avoid being struck.

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[1] The jury was unable to reach a verdict in count 2, which alleged a violation of Penal Code section 245, subdivision (a)(1).

[2] All statutory references are to the Penal Code unless otherwise stated.

[3] The Attorney General argued in respondent's brief that the case must be remanded to the trial court for sentencing on the two prior prison terms not imposed or stricken at sentencing. However, the trial court subsequently issued a minute order reflecting dismissal of the prior prison term allegations under section 1385, and the Attorney General has withdrawn the argument.

Wilbourne-Hamer drove off, intending to go about her business. Defendant followed her as she drove on Crenshaw Boulevard. He pulled his car close to her vehicle and said, "I'm going to fuck you up, bitch." Treating defendant's statement as a threat and fearing violence, Wilbourne-Hamer drove to a nearby police station and reported the incident. The desk officer described Wilbourne-Hamer as appearing to be afraid and in shock.

DISCUSSION

Discovery

Defendant served a subpoena duces tecum on the Custodian of Records, City of Los Angeles, Department of Transportation, for "any and all employment records and/or personnel files for" Wilbourne-Hamer. The stated good cause to support discovery was that the records were "necessary for the proper preparation and presentation of the defense."

The city attorney responded with a motion to quash the subpoena on the grounds it was overbroad, the records were privileged, and discovery would violate the privacy rights of Wilbourne-Hamer. At a hearing on the motion to quash, the trial court clarified that Wilbourne-Hamer was not a peace officer and the discovery principles of *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 were inapplicable. The trial court agreed the subpoena was overbroad but construed it as proper to the extent it sought items relevant to the victim's honesty, veracity, or self-defense. The trial court then conducted an in camera, on-the-record, under oath examination of the custodian of records, concluding there was no discoverable material.

We have reviewed the in camera hearing on the discovery request. We hold the trial court's denial of discovery was not an abuse of discretion.

Failure to Give Cautionary Instruction

In a supplemental brief, defendant argues the trial court prejudicially erred by failing to sua sponte instruct the jury with CALCRIM No. 358[4] that defendant's oral statements—which served as the basis for his criminal threats conviction—must be viewed with caution. Defendant relies on *People v. Diaz* (2012) 208 Cal.App.4th 711 (*Diaz*), which recently held the cautionary instruction is required in the circumstances of this case. *Diaz* rejected the reasoning of *People v. Zichko* (2004) 118 Cal.App.4th 1055, which held no cautionary instruction is required as to the words relied upon as a criminal threat.

We need not take sides in the *Diaz*/*Zichko* debate, because any error in failing to give the cautionary instruction is harmless under the state law test of prejudicial error. (*Diaz*, *supra*, 208 Cal.App.4th at p. 727 [failure to give cautionary instruction subject to harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836]; see *People v. Carpenter* (1997) 15 Cal.4th 312, 393.) The error was found nonprejudicial in *Diaz*, where "the court thoroughly instructed the jury regarding the presumption of innocence, the prosecutor's burden of proof, evaluation of witness credibility, and reliance on circumstantial evidence." (*Diaz*, *supra*, at p. 728, fns. omitted.) Defendant's jury received the same instructions.

Our independent review of the evidence, in light of the jury instructions, supports a determination of harmless error. Wilbourne-Hamer's testimony was direct evidence

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4 CALCRIM No. 358 provides: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

that defendant followed her and made the statements constituting the criminal threat. That defendant followed Wilbourne-Hamer in his car is circumstantial evidence of his intent. Wilbourne-Hamer's decision to go to the police station and report the threat provides corroboration for her testimony. The desk officer's observations about Wilbourne-Hamer's shaken appearance also corroborates her testimony. No conflicting evidence was presented to challenge the words spoken by defendant. Defendant has failed to establish that it is reasonably probable a jury would reach a more favorable result had CALCRIM No. 358 been given.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.